IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

THURSDAY, THE 22ND MARCH 2007 / 1ST CHAITHRA 1929

OP.No. 13039 of 2002(B)

PETITIONER:

E.J. VARKEYACHAN, EDASSERY HOUSE,
CHENGAMANAD VILLAGE, ALUVA, ERNAKULAM.

BY ADV. SRI.P.F.THOMAS (SR.)
SRI.FIROZ K.ROBIN
SRI.J.JULIAN XAVIER

RESPONDENTS:
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1. UNION OF INDIA, REPRESENTED BY
ITS SECRETARY, INDUSTRIES DEPARTMENT,
NEW DELHI.

2. STATE OF KERALA, REPRESENTED BY ITS
SECRETARY, INDUSTRIES DEPARTMENT
GOVT. OF KERALA, THIRUVANANTHAPURAM.

3. DISTRICT COLLECTOR, ERNAKULAM.

4. TAHSILDAR, ERNAKULAM.

5. BHARAT PETROLEUM CORPORATION LTD.,
BHARAT BHAVAN, 4 & 6 CURIMBHOY ROAD,
P.B.NO.688, MUMBAI.

6. DEVAN & CO., BHARAT PETROLEUM CORPORATION DEALERS, KARUKUTTY, ANGAMALY, REPRESENTED BY ITS PARTNER, S. PADMAKUMARI.

7. TERRITORY MANAGER (RETAIL), ERNAKULAM TERRITORY (RETAIL) OFFICE, DR.SALIM ALI ROAD, TATAPURAM P.O., P.B.NO.1606, COCHIN - 14.

BY SRI. AJITH KRISHNAN, ADDL.CGSC R1
BY GOVERNMENT PLEADER SHRI L.G. SURESH BABU, R2 TO 4
BY SENIOR ADVOCATE SHRI N.N. SUGUNAPALAN, R5 & 7

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 22/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P. NO. 22039 OF 2002 IN
O.P. NO. 13039 OF 2002

DISMISSED.

22.3.2007 **ID/- K. PADMANABHAN NAIR, JUDGE.**

APPENDIX

PETITIONER'S EXHIBITS:

EXHIBIT P1 TRUE COPY OF THE NOTIFICATION.

EXHIBIT P2 TRUE COPY OF THE JUDGMENT IN O.P.14462/2001 DATED 4.5.2001.

EXHIBIT P3 TRUE COPY OF THE CHART SHOWING THE AVAILABILITY OF A NUMBER OF OUTLETS NEAR TO PETITIONER'S PROPERTY IN QUESTION.

EXHIBIT P4 TRUE COPY OF THE DD FOR RS.2,21,628/- SEND BY THE 6TH RESPONDENT TO THE 7TH RESPONDENT.

RESPONDENTS' EXHIBITS: **NIL**

K. PADMANABHAN NAIR, J.

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O.P. NO. 13039 OF 2002

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Dated this the 22nd day of March, 2007

J U D G M E N T

This Original Petition is filed to quash Exhibit P1 Notification dated 30.11.2001 issued under Sections 4 and 17(4) of the Kerala Land Acquisition Act and published in Deshabimani daily dated 27.3.2002. Petitioner is the owner of the property comprised in Sy.No.225 of Karukutty Village. That area was let out to the 6th respondent, M/s. Devan & Co., who were running a petroleum retail outlet in that property. Subsequently, action was initiated against the 6th respondent and the licence granted to the 6th respondent was cancelled. The 6th respondent filed O.P. No.14462 of 2001 before this Court, challenging that action. This Court by judgment dated 4.5.2001 directed the competent authority to consider the grievance voiced by the 6th respondent. In the meanwhile, the retail petroleum outlet operated by the 6th respondent was closed and there was no supply of fuel from that outlet for more than one year. At that point of time, the 7th respondent made a

request to the Land Acquisition Officer to acquire the said land invoking the urgency clause under Section 17(4) of the Act to start a petroleum outlet for the Bharat Petroleum Corporation Limited itself. Accordingly, action was initiated and the combined Notification under Section 4 read with Section 17(4) of the Act was issued. Challenging that Notification, this Original Petition is filed.

2. One of the main grounds raised in the O.P. is that the land in question was leased out to the 6th respondent who was conducting a petroleum retail outlet in that property and because of some disputes between respondents 6 and 7, the 7th respondent cancelled the licence granted to the 6th respondent. It was also averred that supply of petroleum products was stopped and for more than 1 1/2 years there was no supply of fuel from the said retail outlet which was functioning in the property in question. It was further averred that the 7th respondent wanted to teach the 6th respondent a lesson and with that mala fide intention, initiated steps to acquire the property wherein the retail outlet was functioning. According to the petitioner there is absolutely no need to invoke the urgency clause under Section 17(4) of the Act. It was alleged that there was fraudulent misuse of power

granted by the statute under the Act. It was contended that there are a number of petroleum outlets functioning near the property in question within a distance of 2.5 Kms. It was further contended that no opportunity was given under Section 5A of the Act to establish that fact. Hence this Original Petition.

3. The 4th respondent, Special Tahsildar (LA), Ernakulam has filed a detailed counter affidavit. It is stated that the requisition for the acquisition of land in Sy.No.225/4, 40cents in extent, was made to the District Collector Ernakulam in Form No.2 along with a covering letter dated 13.12.2000 by the Territory Manager (Retail), BPC Ltd., Ernakulam. It was further contended that the District Collector has appointed the Special Tahsildar (LA) IBP Vyttila as the land Acquisition Officer and forwarded the requisition and other records for initiating land acquisition proceedings. It was further contended that it was informed by the requisitioning authority that acquisition was urgently required to maintain the uninterrupted fuel supply to the public between Angamaly and Karukutty and to obtain the sanction from the Industries Department to invoke the urgency clause under Section 17(4) of the Act. Though it was specifically averred in

the counter affidavit that copies of letters dated 13.12.2000 and 23.2.2001 were produced along with the counter affidavit, those copies were not produced. It was further contended that the proposal for invoking the urgency clause under Section 17(4) of the Act was submitted to the District Collector as per letter dated 23.2.2001. It was also contended that the Government had accorded administrative sanction for invoking the urgency clause under Section 17(4) of the Act as per G.O (Rt.) No.800/2001 dated 11.9.2001, Industries Department, Thiruvananthapuram. Though it was averred that a copy of that order was also produced along with the counter affidavit, that document was also not produced. It was contended that in view of the administrative sanction, a composite Notification under Section 4 read with 17(4) of the Act was prepared and submitted to the District Collector, Ernakulam for the approval of the Government and for publication in the Extraordinary Gazette on 26.8.2001 and the same was duly published on 22.12.2001. It was contended that the Notification was duly published in two local dailies as provided under the Act and at that time this Original Petition was filed. It was specifically contended that the need projected is an urgent need. It was further contended that the urgency clause was invoked as

required by the requisitioning authority which contained in the letters dated 13.12.2000 and 23.2.2001. It was further contended that the urgency clause was invoked to maintain the uninterrupted fuel supply to the public between Angamaly and Karukuty where the retail outlet was in existence before and the non-operation of the outlet had caused inconvenience to the motoring public at large. It was contended that BPCL, the requisitioning authority, is a public sector undertaking. It was contended that steps were taken strictly in accordance with law and there was no mala fides. The allegation that the powers were fraudulently misused was denied.

4. Respondents 5 and 7 jointly filed a counter affidavit in which it was contended that the acquisition proceedings were initiated for running a retail outlet of the 5th respondent company at Karukutty. It was contended that the 6th respondent, M/s. Devan and Company were running a retail outlet therein and one of the partners of the said dealership firm and the wife of another partner were owners of the land at the time of awarding the dealership to the 6th respondent. It was contended that contrary to the terms of the dealership agreement, partners of the 6h respondent had assigned the

benefits under the dealership to the petitioner herein without the previous consent or approval of the 5th respondent and subsequently his dealership was cancelled and the licence was terminated. It was also contended that as per the terms of the agreement between 6th and 7th respondents in the event of termination of the dealership, the dealer is bound to give the land on lease at a rental excluding Municipal taxes which shall not be more than 10% of the then prevailing market value of the land. It was further contended that this was to ensure that there is no interruption in the supply of petroleum products to the customers even if there is any change of licence/dealership. It was contended that the purchase of the petitioner of that dealership is also subject to the abovesaid clause. It was also contended that the petitioner had executed an agreement with the 6th respondent which contains provision to sub lease the property to BPCL. It was contended that BPCL have got a lien on the land and it was proposed to acquire the land. It was contended that the landlord has therefore now multiple options available either to allow BPCL to exercise its lien as per the agreement or to acquire the land. It was contended that the petitioner had filed a petition before the Minister for Petroleum and Natural Gases on 23.3.2001 wherein there was a request

to include one Shri E.J. Varkiachan Brother as partner of the Company. It was contended that when all such attempts were failed, petitioner has now filed this Original Petition. It was also contended that petitioner was acting in connivance with the 6th respondent, whose licence was terminated. The averment that the action initiated for acquisition of the property by invoking the urgency clause is actuated with mala fides is denied. They pressed for a dismissal of the Original Petition.

5. On 20.8.2004, petitioner filed an additional affidavit stating that after the filing of the Original Petition the 5th respondent had established a new Petrol Bunk on 28.3.2004 approximately within 2 kms. distance from the property sought to be acquired. It was stated further that since the 5th respondent had started a new petroleum retail outlet, there was no necessity for acquiring the land of the petitioner. Regarding that contention, respondents 4 and 7 have filed a counter affidavit. It was averred therein that the BPCL has opened a new retail outlet within a distance of 2 kms. from the land sought to be acquired. It was further contended pursuant to the policy of liberalisation of petroleum sector, all Oil Companies were given freedom for commissioning new retail

outlets as per their business plan. It was contended that along with other Oil Companies the Corporation has been commissioning new retail outlets to maintain its market share. It was also contended that it was in that background the Corporation has commissioned a new retail outlet within 2 Kms. from the disputed land. It was contended that distance between different petroleum retail outlets is not at all a criteria for starting a petroleum retail outlet in the land in question. It is reiterated that the area sought to be acquired, Angamaly, is a high potential area. There are 7 retail outlets and the fuel supply as a combined volume will come to approximately 2000 Kilo liters per month. A true copy of the trading area Map of the retail outlets in that area was also produced along with the counter affidavit. It was further contended that NH-47 is passing through that area and the projected volume will continue to increase in future and hence the location had the potential of adding few more retail outlets. The Corporation has only one retail outlet in Angamaly and hence the Corporation has a definite plan of increasing its representation.

6. The main question arising for consideration in this Original Petition is whether the Land Acquisition Authorities are justified in invoking the rgency clause under Section 17(4) of

the Act.

7. Learned counsel for the petitioner relying on the principles laid down in **Om Prakash and another v. State of U.P. and Others** (1998 (6) SCC 1), **Union of India v. Mukesh Hans** (2004 (8) SCC 14), **Union of India and Others v. Kirshanlal Arneja and Others** (2004 (8) SCC 453) and **Vasantha Prasad v. State of Kerala** (2005 (4) KLT Short Notes Case No.4 Page No.6) has argued that there was no necessity for the Government to invoke the urgency clause under Section 17(4) of the Act in this acquisition. It is argued that Government should have applied its mind and took a decision as to whether it was just and proper to invoke the provisions of Section 17(4) of the Act in this acquisition.

8. Learned Government Pleader has argued that it is for the Government to decide whether it is necessary to invoke the urgency clause in a particular acquisition proceeding and the same cannot be interfered with unless there is non-application of mind and the same was actuated with mala fides.

9. In this case the acquisition proceedings were initiated at the instance of the 7th respondent who is the requisitioning authority. Though in the counter affidavit filed

by the Land Acquisition Officer it was specifically averred that the letter written by the requisitioning authority and also the order passed by the Government by which it has invoked the urgency clause under Section 17(4) of the Act were produced, copies of those documents were not produced. I have perused the files of the Land Acquisition Officer. It shows that on 13.12.2000 the 7th respondent has written a letter to the District Collector requesting for acquisition of land in which it was stated that the acquisition was urgently required to maintain the uninterrupted fuel supply to the public at large between Angamaly and Karukutty. Along with the said letter the 7th respondent has enclosed a copy of Requisition Form No.2. In the counter affidavit the 7th respondent has reiterated that the acquisition was urgently required to maintain the uninterrupted fuel supply to the public.

10. On 21.2.2001 the requisitioning authority has again wrote a letter to the Special Tahsildar (LA) in which it was stated that non-operation of the outlet had caused inconvenience to the motoring public at large and made a request to invoke the urgency clause under Section 17(4) of the Act. The Land Acquisition Officer forwarded the Requisition Form and the correspondence to the District

Collector, Ernakulam, who in turn forwarded the same to the Government on 9.4.2001. On getting the materials, the Government had applied its mind and examined the proposal. It was specifically stated that request was made to invoke the urgency clause under Section 17(4) of the Act in order to maintain the uninterrupted fuel supply by taking over the retail outlet in the land in question. The Government had accorded administrative sanction. So the files show that the requisitioning authority had written to the District Collector as well as the Land Acquisition Officer the purpose for which the urgency clause has to be invoked. Government had examined the matter and took a view that for maintaining uninterrupted fuel supply to the motoring public at large, the land in question has to be acquired by invoking the urgency clause under Section 17(4) of the Act. It has to be noted that the petitioner himself had admitted in the petition that the land was leased out to the 6th respondent who were running a petroleum retail outlet in that land. It was also admitted that the licence granted to the 6th respondent was cancelled and the outlet was closed for more than 1 1/2 years prior to the date of filing of the Original Petition. It is true that other retail petroleum outlets are functioning in the nearby area. But respondents 5

and 7 had stated that the Corporation itself wants to establish a retail outlet in the land in question.

11. Materials on record show that during the pendency of the Original Petition respondents 5 and 7 started another retail outlet within a radius of 2 Kms from the land in question. According to the petitioner due to the functioning of the new outlet there is no need for starting a retail outlet by the Corporation itself in the land in question. Such a contention cannot be accepted. Land acquisition proceedings were initiated at the instance of the requisitioning authority. This Original Petition is pending for more than 5 years. Public Sector Companies cannot be asked to wait indefinitely. Further the Corporation has projected its need for stating a new outlet in the land in question. This Court cannot sit in appeal over a decision taken by a commercial concern which alone is competent to decide the potentials of the market that too in respect of a petroleum outlet. The land is situated near the National Highway wherein a lot of trading and business activities are going on. So the factual position explained in this case justifies the invocation of Section 17(4) of the Act. Hence I do not find any reason to hold that the action taken by the 7th respondent is actuated with mala fies.

In the result, there is no merit in the Original Petition and it is accordingly dismissed

K. PADMANABHAN NAIR, JUDGE.

vsv

K. PADMANABHAN NAIR, J.

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O.P. NO. 13039 OF 2002

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J U D G M E N T

22ND MARCH, 2007